UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

AMBER ARD PLAINTIFF

VS. CIVIL ACTION NO. 5:13CV249TSL-JMR

STEVE RUSHING, ET AL. DEFENDANTS

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendants Lincoln County, Mississippi and Lincoln County Sheriff Steve Rushing, in his official capacity,[1] for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff Amber Ard has responded to the motion, and the court, having considered the memoranda of authorities, together with the attachments, submitted by the parties, concludes that the motion is well taken and should be granted.

Plaintiff Amber Ard filed this action pursuant to 42 U.S.C. §§ 1983 and 1985 against Lincoln County and Sheriff Rushing, in his individual and official capacities, and against former deputy sheriff Tim Miller, asserting claims for violation of the Fourth,

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[1] "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity." Goodman v. Harris Cty., 571 F.3d 388, 395 (5th Cir. 2009) (quoting Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)). Accordingly, references herein to "defendant" will include Lincoln County and Sheriff Rushing, in his official capacity.

Fifth and Eighth Amendments, and also alleging a state law claim for negligence, relating to an incident in which she was sexually assaulted by defendant Miller while she was incarcerated at the Lincoln County Jail. As the court previously detailed in its August 30, 2012 opinion granting Rushing's motion for summary judgment in his individual capacity, Ard alleges in her complaint that following her June 9, 2010 arrest by the Lincoln County Sheriff's Department for an alleged probation violation, she was placed in a jail cell on the upper floor of the county jail facility, which was an area designated for female inmates only and in which only female guards were allowed. According to the complaint, early on the morning of June 11, 2010, Ard, who was the only inmate then housed on the upper floor, was awakened by Miller, who offered her cigarettes and began making sexual remarks and advances toward her. Ard refused his offers and demanded that Miller leave her cell. Miller, who appeared calm and rational, complied.

Early the next morning, though, an agitated Miller awakened Ard and forced her into a small room with a padded mat on the floor, where he sexually assaulted her. Ard alleges that she did not report the rape to jail officials that day because she was under constant watch by other male guards by whom she felt threatened. However, she reported the rape the next day when a female deputy, Tosha Williams, began her shift at the jail. Ard was transported to the hospital where she was examined and found to have been sexually assaulted. Within a week of Ard's having reported the rape, Sheriff Rushing terminated Miller's employment. Miller was subsequently arrested for sexual assault and later pled guilty to sexual penetration of an incarcerated individual, in violation of Mississippi Code Annotated § 97-3-104.[2]

This court previously dismissed the state law claims as precluded by various provisions of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 *et seq*., see Ard v. Rushing, et al., Civ. Action No. 3:12CV2TSL-MTP (S.D. Miss. Feb. 15, 2012), and it dismissed the claims against Sheriff Rushing in his individual capacity on the basis of qualified immunity, see Ard v. Rushing, et al., Civ. Action No. 3:12CV2TSL-MTP (S.D. Miss. Aug. 30, 2012). Lincoln County has now moved for summary judgment on Ard's remaining federal claims. In support of the motion, the County maintains that Ard can establish neither that any official county policy was the "moving force" behind her sexual assault by Miller, nor that Sheriff Rushing failed to supervise Miller or that any alleged failure amounted to deliberate indifference. Finally, the County asserts that Ard's civil conspiracy claim under 42 U.S.C. § 1985(3) fails as a matter of law, as Ard has neither alleged nor presented evidence to show that any Lincoln County employee made an agreement with any person to commit acts that would deprive Ard of equal protection of the law. In response, Ard insists that genuine issues of material fact preclude summary judgment. The court, however, having thoroughly and carefully reviewed and considered the record evidence, concludes that summary judgment is in order.

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[2] This statute makes it unlawful for any jailer or employee of a law enforcement agency or correctional facility "to engage in any sexual penetration ... or other sexual act with any offender, with the offender's consent...." Miss. Code Ann. § 97-3-104(1). As Ard notes in her response, Miller has claimed that the sex was consensual. Whether it was consensual or not, a crime was committed. The court notes, though, that for purposes of the present motion, the County has assumed that the sex was not consensual and that Miller sexually assaulted Ard.

Section 1983 provides a cause of action against any person who, under color of law, deprives another of "any rights, privileges or immunities secured by the Constitution and laws...." 42 U.S.C. § 1983. In this case, Ard alleges that Lincoln County is liable under § 1983 for its failure to protect her from the sexual assault by Miller. As a pretrial detainee, the source of Ard's right to protection from harm stems from the Due Process Clause, pursuant to which prison officials have a duty to take reasonable measures to protect the safety and bodily integrity of inmates in their custody. See Hare v. City of Corinth, 74 F.3d 633, 639 (5th Cir. 1996) (en banc).[3] To establish a failure-to-protect claim, a prisoner must show that [she] was 'incarcerated under conditions posing a substantial risk of serious harm and that prison officials were deliberately indifferent to [her] need for protection." White v. Fox, 470 Fed. Appx. 214, 220 (5th Cir. 2012) (quoting Neals v. Norwood, 59 F.3d 530, 533 (5th Cir. 1995)). See also Cantu v. Jones, 293 F.3d 839, 844 (5th Cir. 2002) (prison officials can be held liable for their failure to protect an inmate only when they are deliberately indifferent to a substantial risk of serious harm) (citing Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). However, as there is no *respondeat superior* liability under § 1983, in order to hold a governmental entity for the

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[3] The court now appreciates that at the time of the assault, Ard was in custody awaiting a probation revocation hearing. As such, she was essentially a pretrial detainee. See Smith v. Harris County, 198 F.3d 241, 1999 WL 824545, 1 (5th Cir.

1999) (status of inmate awaiting a probation revocation hearing was that of a pretrial detainee). Whereas convicted state prisoners are protected under the Eighth Amendment's prohibition of cruel and unusual punishment, "[t]he constitutional rights of a pretrial detainee ... flow from both the procedural and substantive due process guarantees of the Fourteenth Amendment" when it comes to "rights to basic needs such as medical care and safety." Hare v. City of Corinth, 74 F.3d 633, 639 (5th Cir. 1996) (en banc). However, where a plaintiff's claim is based on an act or omission as contrasted with a challenge to her conditions of confinement, the analysis is the same, since "the State owes the same duty under the Due Process Clause and the Eighth Amendment to provide both pretrial detainees and convicted inmates with basic human needs, including ... protection from harm, during their confinement." Id. at 650. This case clearly falls within the episodic-act-or-omission category. See Scott v. Moore, 114 F.3d 51, 53 (5th Cir. 1997) (explaining that although the plaintiff inmate complained generally that inadequate staffing led to sexual assault by guard, "the actual harm of which she complain[ed] [was] the sexual assaults committed by [guard] during the one eight-hour shift" and thus was an "episodic event perpetrated by an actor interposed between Scott and the city").

actions of its employee, “Plaintiff must put forth facts ‘sufficient to demonstrate that the [sexual assault] resulted from a municipal custom, rule, or policy adopted or maintained with objective deliberate indifference to the detainee's constitutional rights.’” Hardeman v. Kerr County Tex., 244 Fed. Appx. 593, 596-597 (5th Cir. 2007) (quoting Scott v. Moore, 114 F.3d 51, 54 (5th Cir. 1997) (en banc)). “[T]his is a hefty burden for the Plaintiff to meet.” Id.

In this vein, the Fifth Circuit has made it clear that “the existence of a constitutional violation *simpliciter* and a municipality's liability for that violation” are two distinct issues and that “[d]ifferent versions of the deliberate indifference test govern the two inquiries.” Hare v. City of Corinth, 74 F.3d 633, 649 n.4 (5th Cir. 1996)(en banc).

> [T]o prove an underlying constitutional violation in an individual or episodic acts case, a pre-trial detainee must establish that an official acted with subjective deliberate indifference. Once the detainee has met this burden, she has proved a violation of her rights under the Due Process Clause. To succeed in holding a municipality accountable for that due process violation, however, the detainee must show that the municipal employee's act resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference to the detainee's constitutional rights. See Farmer [v. Brennan, 511 U.S. 825, 841, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811 (1994)] (“It would be hard to describe the Canton [v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)] understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective.”).

Id.; see also Scott v. Moore, 114 F.3d 51, 54 (5th Cir. 1997) (quoting Hare). Along these lines, the Fifth Circuit has held more specifically that to prevail on a failure-to-protect claim,

> the plaintiff must demonstrate: "(1) that the municipal employee violated [the pretrial detainee's] clearly established constitutional rights with subjective deliberate indifference; and (2) that this violation resulted from a municipal policy or custom adopted and maintained with objective deliberate indifference." Olabisiomotosho v. City of Houston, 185 F.3d 521, 528-29 (5th Cir. 1999). To demonstrate subjective deliberate indifference under the first prong, the plaintiff must show that the municipal employee "knew of and disregarded an excessive risk to the [detainee's] health or safety." Gibbs v. Grimmette, 254 F.3d 545, 549 (5th Cir. 2001). Under the second prong, the plaintiff must identify a policymaker and show that an official policy is the "moving force" behind the municipal employee's allegedly unconstitutional act. [Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001)]. The objective deliberate indifference standard "considers not only what the policymaker actually knew, but what he should have known, given the facts and circumstances surrounding the official policy and its impact on the [pretrial detainee's] rights." Lawson v. Dallas County, 286 F.3d 257, 264 (5th Cir. 2002); see Burge [v. St. Tammany Parish, 336 F.3d 363, 370 (5th Cir. 2003)] ("Knowledge on the part of a policy maker, [either actual or constructive,] that a constitutional violation will most likely result from a given official custom or policy is a *sine qua non* of municipal liability under section 1983.").

Brumfield v. Hollins, 551 F.3d 322, 331 (5th Cir. 2008). See also Anderson v. Dallas Cty, 286 Fed. Appx. 850, 860 (5th Cir. 2008) (explaining that to hold a governmental entity liable under § 1983 for failure to protect, plaintiff must establish that "(1) a county employee violated his clearly established constitutional rights with subjective deliberate indifference and (2) the violation resulted from a county policy or custom adopted or maintained with objective deliberate indifference”) (citing Scott, 114 F.3d at 54). “‘[D]eliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” Board of County Comm'rs v. Brown, 520 U.S. 397, 410, 117 S. Ct. 1382, 1391, 137 L. Ed. 2d 626 (1997). “A county acts with objective deliberate indifference if it promulgates (or fails to promulgate) a policy or custom despite ‘the known or obvious consequences’ that constitutional violations would result.” Anderson, 286 Fed. Appx. at 860.

Here, Ard has undoubtedly identified a violation of her constitutional rights committed with subjective deliberate indifference by Miller. See Hardeman, 244 Fed. Appx. at 597 (rape of inmate by prison guard was a “‘discrete, episodic act ... committed with deliberate indifference’ to the Plaintiff's rights”) (citing Scott v. Moore, 114 F.3d 51, 54 (5th Cir. 1997) (en banc)). However, in the court’s opinion, it is clear she has failed to present evidence that any official policy was the moving force behind this violation.

To establish municipal liability under § 1983, a plaintiff must show that an official policy promulgated by the municipal policymaker was the moving force behind the violation of a constitutional right.

> An official policy can arise in various forms. It usually exists in the form of written policy statements, ordinances, or regulations, but it may also arise in the form of a widespread practice that is "so common and well-settled as to constitute a custom that fairly represents municipal policy." A policy or custom is official only "when it results from the decision or acquiescence of the municipal officer or body with 'final policymaking authority' over the subject matter of the offending policy." Thus, a plaintiff must show that the policy was promulgated by the municipality's final policymaker. Finally, a plaintiff must also establish that there is a direct causal link between the policy and the constitutional violation.

Scott v. Cleveland City of Texas, Civil Action No. 1:08CV774, 2010 WL 786013, 7 (E.D. Tex. Mar. 1, 2010) (quoting Peterson v. City of Fort Worth, 588 F.3d 838, 847 (5th Cir. 2009)).

It is undisputed that Sheriff Rushing is a final policymaker for the County with regard to the day-to-day operation of the jail. See Grissom v. Patterson, 14 F.3d 52, 1993 WL 560256, at *2 (5th Cir. 1993) (stating that "[a] county, or other local governmental entity, can be held accountable for the actions of an individual with final policy making authority regarding the action that allegedly caused the particular constitutional violation" and recognizing that under Mississippi law, defendant sheriff had "final policy making authority for [county] over the county jail").

In cases where the plaintiff maintains that a specific policy by a governmental entity or action taken or authorized by a policymaker violates the constitution, the issues of fault and causation are straightforward and proving the existence of the unlawful policy ends the inquiry. Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 117 S. Ct. 1382, 1404-05, 137 L. Ed. 2d 626 (1997). However, in cases where the policy or action taken by the policymaker is not unlawful on its face, "rigorous standards of culpability and causation must be applied to ensure that the [governmental entity] is not held liable solely for the actions of its employees." Id.

Ard certainly does not contend that Sheriff Rushing promulgated an official policy of permitting guards to sexually assault inmates or that he authorized Miller's assault on her. Rather, she claims that Sheriff Rushing's actions and/or inaction, as the County's final policymaker, were undertaken with deliberate indifference to the likelihood that Miller would commit sexual assault on female inmates and hence were the moving force behind Miller's assault on her. In this regard, she first asserts that Sheriff Rushing, as the final policymaker for the jail, operated the jail with a policy, practice or custom of failing to provide adequate safeguards to prevent access to and/or monitor interaction by male guards with the female inmate population. Ard acknowledges that there were ostensibly in place a policy of prohibiting male jailers from having one-on-one contact with female inmates, a practice of structuring work shifts to ensure that a female jailer was on shift at all times and use of a video system in place that allowed for constant monitoring of access to the female section of the jail. She contends, however, that these purported safeguards were not observed and/or effectively implemented. According to Ard, record evidence shows that male jailers (including Miller) entered female inmates' cells and the female-only area of the jail without a female jailer, and she notes that Miller has testified that there were instances in which a female jailer was either not present at the jail or could not be located. She concludes that to the extent that any monitoring was done through use of the video surveillance system, such monitoring was obviously ineffective, and not unsurprisingly so, as no male guard was ever disciplined for an infraction of the putative policy against entering the female-only section without a female guard. Ard suggests as a result of the routine disregard of these ostensible protective measures, Sheriff Rushing had no real policy or practice in place to protect female inmates by limiting male guards' access to them and that such deliberate indifference was a moving force behind Miller's assault of her.

The court is unpersuaded.

The Fifth Circuit has stated clearly that the "Constitution does not require jails that house female detainees either to staff more than one jailer at a time or to staff a female jailer." Guevara v. City of Haltom City, 106 Fed. Appx. 900, 2004 WL 1777165 (5^{th} Cir. Aug. 10, 2004) (citing Scott v. Moore, 114 F.3d

51, 52 (5th Cir. 1997) (en banc)). Thus, the failure to have in place a policy, practice or custom of prohibiting male guards from having one-on-one contact with female inmates does not constitute deliberate indifference. Put another way, without more, any failure on Sheriff Rushing's part to discipline male guards for a breach of the County's policy against one-on-one contact or to have female jailers available at all times would not constitute deliberate indifference to the safety of female inmates.

Beyond claiming that male jailers in general posed a threat to the safety of female inmates, Ard contends that prior to Miller's assault of her, Sheriff Rushing was aware that Miller had been accused of sexual assault by other female inmates; and she submits that in light of this knowledge, Sheriff Rushing's failure to establish adequate safeguards to protect female inmates from sexual assault by Miller, in particular, constitutes deliberate indifference. According to Ard, rather that disciplining Miller for these prior incidents of sexual misconduct and establishing adequate safeguards, Rushing promoted Miller to shift supervisor and gave him the keys to the female inmate cell block in utter disregard for the inmates' safety. In the court's opinion, however, the evidence does not support plaintiff's position. That is, despite plaintiff's insistence to the contrary, there is no evidence to show that Rushing knew or had reason to believe that Miller posed a substantial risk of harm to the female inmates in his charge such that it was incumbent upon him to take additional action to protect female inmates, the failure of which could have amounted to a County policy undertaken with deliberate indifference.

On the question of Rushing's knowledge, Ard points out that in 2006 and 2009, accusations of sexual misconduct were leveled against Miller, which she contends necessarily came to Rushing's attention.[4] She additionally asserts that prior to Miller's assault on Ard in June of 2010, Rushing knew or should have known that Miller had sexually assaulted another inmate, Crystal Smith, at the jail. As the court explained in its August 2012 opinion, in 2006, a female inmate accused Miller of unwanted sexual contact and made additional allegations that Miller had engaged in sex with other female inmates, and in 2009, there was a jailhouse rumor that Miller had asked a female inmate to show him her breast. However, at the request of the Sheriff's Department, the 2006 allegations were investigated by an outside agency, the

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[4] Although he acknowledges the 2006 allegation, Rushing denies any personal recollection of it. He attributes his lack of recollection to the fact that the allegations surfaced only two weeks after his having first been elected sheriff and the fact that the Mississippi Bureau of Investigation, and not the Lincoln County Sheriff's Department, conducted the investigation. Ard challenges the credibility of Rushing's assertion that he does not recall the 2006 allegations against Miller by Sonya Smith. The County is charged with knowledge, regardless of whether Rushing specifically recalls the incident and ensuing investigation. In the end, however, it is of little import as the allegation was found to be unsubstantiated following an investigation by the Mississippi Bureau of Investigation.

Mississippi Bureau of Investigation, which reported that they could not be substantiated. Further, the Sheriff Department's investigation of the 2009 allegations also failed to substantiate the inmate's accusations.[5]

Moreover, contrary to Ard's assertion otherwise, there is no proof that Rushing or the County knew of Miller's alleged rape of former inmate Crystal Smith prior to Miller's assault on Ard so as to put the County on notice of any danger to female inmates posed by Miller's presence in the jail. In support of her response to the summary judgment motion, plaintiff presented an affidavit from Crystal Smith, in which Smith states that Miller raped her in

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[5] These investigations were described as follows in the court's August 2012 opinion:

> [T]he evidence establishes that at the request of the Sheriff's department, the Mississippi Bureau of Investigation (MBI) conducted an investigation of the 2006 allegations, which included interviewing Miller's alleged accuser and other female inmates with possible knowledge; and following the investigation, the MBI's investigator advised jail officials, specifically, Major Dustin Bairfield, that there was nothing to the inmate's allegation. No criminal charges were filed and the complainant did not pursue any civil claim.
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> As regards the 2009 rumor that Miller had asked a female inmate to show her breast, the chief deputy assigned by Rushing to conduct the investigation spoke to each female inmate housed at the jail and no female inmate reported having received such a request, having heard hearing Miller make such a request to another inmate or having heard from another inmate that such a request had been made.

Ard v. Rushing, et al., Civ. Action No. 3:12CV2TSL-MTP, at 10-11 (S.D. Miss. Aug. 30, 2012)

November 2009 while she was incarcerated at the jail. Smith reports that Miller threatened to make her stay at the jail difficult if she told anyone about the rape. She further declares that she gave a statement about the rape to "the District Attorney for Pike and Lincoln Counties."

For his part, Rushing has submitted his own affidavit in which he states he was unaware of any alleged misconduct by Miller against Smith until August 20, 2012, when he received a copy of Smith's civil complaint against Miller, Rushing and Lincoln County. Furthermore, while Smith's affidavit does not identify the date on which she made her statement to the District Attorney, other documents in the record seem to indicate that she first reported the incident to the District Attorney on August 10, 2010, approximately two months *after* Miller assaulted Ard. As the County correctly points out (and plaintiff offers no authority to the contrary), the District Attorney is a state, not County official, see Brooks v. George Cty., 84 F.3d 157, 168 (5th Cir. 1996)(district attorney is considered a state official in Mississippi); and therefore there is no basis for imputing the District Attorney's knowledge of the Smith rape to the County.[6]

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[6] While there is no evidence that the District Attorney's office related Smith's complaint to the County or to anyone in the Sheriff's Department, plaintiff suggests that a jury may reasonably infer that the District Attorney shared Smith's accusation with the Sheriff's Department. The court perceives no basis for such an inference.

But even if such knowledge were imputed, the fact is, Smith's rape accusation was made approximately two months after Miller's assault on Ard and thus could not have placed Rushing or the County on notice that Miller posed a substantial risk of harm to the female inmates. Accordingly, Rushing's failure to take additional action to protect female inmates *from Miller* does not constitute a policy enacted with objective deliberate indifference to Ard's rights.[7] It follows that plaintiff's § 1983 claim for failure to protect will be denied.[8]

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[7] Plaintiff has moved for sanctions on account of defendant's alleged failure to disclose or produce the August 2010 statement given by Crystal Smith to the District Attorney's office. The statement in question was given by Smith to an investigator for the District Attorney's office. The motion is without merit and will be denied. Beyond plaintiff's speculation and conjecture, there is nothing to indicate that Sheriff Rushing, Lincoln County or their counsel was aware of the statement or had been provided a copy of that statement prior to November 2013, when counsel received a copy of the statement from Miller's attorney in the Smith lawsuit. Plaintiff has similarly speculated based on Smith's August 2010 report of her rape by Miller to the District Attorney that Sheriff Rushing and Lincoln County must have known about Smith's allegations when Sheriff Rushing testified by deposition in May 2012 that he had no knowledge of a Crystal Smith having been incarcerated in the jail. However, the court reiterates, there is no evidence - only plaintiff's supposition - to contradict Sheriff Rushing's affidavit testimony that he first learned of Smith's rape allegation when he was served with her lawsuit in August 2012. Accordingly, the motion for sanctions will be denied.

The court will also deny as moot defendant's motion to strike plaintiff's rebuttal on the motion and plaintiff's cross motion for leave to file rebuttal in support of motion for sanctions and in opposition to defendant's motion for summary judgment,

[8] By its August 2012 opinion, the court dismissed plaintiff's claims for failure to train/supervise, concluding that

In addition to her claims under § 1983, plaintiff has attempted to state claims for relief under § 1985(3), alleging that "[t]he acts described above ... constitute a civil conspiracy to deprive the Plaintiff of the rights and privileges of a Citizen of the United States guaranteed under the Constitution of the United States...." Defendant seeks dismissal of this claim on the basis that plaintiff has failed to allege a conspiracy based on discriminatory animus. The Fifth Circuit has repeatedly held that "[e]ssential to the [§ 1985(3)] claim ... is that the conspiracy be motivated by racial animus." Word of Faith World Outreach Ctr. Church v. Sawyer, 90 F.3d 118, 124 (5th Cir. 1996). Here, not only has plaintiff not alleged any discriminatory animus in the complaint, she explicitly declares in her response that "[t]his claim under Section 1985 is not based on discriminatory animus." Accordingly, this claim will be dismissed.

Based on all of the foregoing, it is ordered that the motion of Lincoln County and Sheriff Rushing in his official capacity for summary judgment is granted. It is further ordered that the motion of plaintiff for sanctions is denied, as are the motion of

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plaintiff had failed to establish the requisite elements of the causes of action. As the "same standards of fault and causation apply to an individual supervisor's liability and the liability of a municipality for failure to supervise," Lewis v. Pugh, 289 Fed. Appx. 767, 771 (5th Cir. Aug. 18, 2008), and as plaintiff has failed to come forward with any additional proof in support of these claims, it is clear that summary judgment is appropriate as to these claims as well.

Lincoln County and Sheriff Rushing to strike plaintiff's rebuttal on the motion for sanctions, and plaintiff's motion to file a rebuttal in support of her motion for sanctions and in opposition to the summary judgment motion.

SO ORDERED this 10th day of February, 2014.

/s/ Tom S. Lee______________
UNITED STATES DISTRICT JUDGE